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88-459

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1988

No._____

BELINDA ANDERSON, et al., Petitioners

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATED COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an Indian tribe is subject to income tax on income it derives from the rental of tribal trust land.

2. Whether the tax exempt character of the income derived from tribal trust lands changes upon its distribution to tribal members who are the beneficiaries of the trust.

I

LIST OF ALL PARTIES

Belinda Anderson,

and

Geneva Anderson, Kenneth Anderson, Kenny Anderson, Asa Begaye, Lawana Begaye, Ilee H. Castillo, Alfreda Catha, Debra Faria, Robert Faria, Billy Frye, Margaret Henry, Daisy Mike, Max Patrick, Delores Pete, Larry Pete, Angela Sanchez, Donald Shearer, Gloria Shearer, Elaine Wilson, Marie Wilson, and Gloria Yazzie,

Petitioners,

vs.

United States of America.

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Section 348 8

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Section 462 15

Section 465 5

Section 476 20

Section 564(j) 20

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OCTOBER TERM, 1988

No.____

BELINDA ANDERSON, et al., Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Peter J. Sferrazza, on behalf of Geneva Anderson, Kenneth Anderson, Kenny Anderson, Asa Begaye, Lawana Begaye, Ilee H. Castillo, Alfreda Catha, Debra Faria, Robert Faria, Billy Frye, Margaret Henry, Daisy Mike, Max Patrick, Delores Pete, Larry Pete, Angela Sanchez, Donald Shearer Gloria Shearer, Elaine Wilson, Marie Wilson, and Gloria Yazzie, petitions for a Writ of Certiorari to review the judgment of the United States Court of

Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-7a) is reported at ___ Fed.2d ___. The opinion of the district court (App. B, infra, 8a - 18a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1988 (App. A, infra, 1a - 7a). A petition for rehearing was denied on June 14, 1988 (App. C, infra, 19a). The Petition for Rehearing was timely filed pursuant to Rule 20.4. The time for filing a Petition for Writ of Certiorari is ninety days from the date of the denial of the Petition of Rehearing, which was June 14, 1988, and therefore the Petition for Writ of Certiorari is due September 12, 1988. The jurisdiction of this Court is invoked

under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Rule 21(f) the statutory provisions involved are cited below and their pertinent text is set forth in Appendices D and E (infra 20a -- 26a).

1. 25 U.S.C. Section 335. Extension of provisions as to allotments.

2. 25 U.S.C. Section 348. Patents to be held in trust; descent and partition.

3. 25 U.S.C. Section 415. Leases of restricted lands for public, religious, educational, recreational, residential, business, and other purposes; approval by Secretary.

4. 25 U.S.C. Section 461. Allotment of land on Indian reservations.

5. 25 U.S.C. Section 462. Existing period of trust and restrictions on alienation extended.

6. 25 U.S.C. Section 465. Acquisitions of lands, water rights or surface rights; appropriation; title to lands; tax exemption.

7. 25 U.S.C. Section 476. Organization of Indian tribes; constitution and bylaws; special election.

8. 25 U.S.C. Section 564(j). Taxes; initial exemption; taxes following distribution; valuation for capital gains or losses.

9. 25 U.S.C. Section 898. Taxes; initial exemption; taxes following distsribution; valuation for income tax on gains or losses.

10. Internal Revenue Code. Income Taxes, Section 652. Inclusion of amounts in gross income of beneficiaries of trust distributing current income only.

STATEMENT

Petitioners are individual Indian tribal members who brought suit for the refund of federal income taxes, which they paid on their share of tribal income derived from the lease of tribal lands. The basis of federal jurisdiction in the district court was 28 U.S.C. Section 1346(a)(1), which allows a civil action for recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected.

This case involves a lease of tribal trust land by the Las Vegas Paiute Tribe to a non-tribal member, Stephen King. The land in question was acquired by the Secretary of the Interior for the Las Vegas Paiute Tribe and held in trust pursuant to the Indian Reorganization Act, 25 U.S.C. Section 465.

This lease was negotiated and approved by the Bureau of Indian Affairs

acting in its capacity as Trustee pursuant to 25 U.S.C. Section 415.

The land leased by Mr. King was extremely valuable since it is only a few blocks away from downtown Las Vegas, Nevada, on Main Street. It happened to be used by Mr. King for a smokeshop, but it could have been used for a hotel-casino, a mini-mart, a parking lot, or any number of business ventures.

In fact, the rent received for the land was arguably less than fair market resulting in protracted litigation and the eventual removal of Mr. King.

On June 23, 1980, the Tribe distributed its accumulated rental income to its members. All of the twenty-one Petitioners included the distribution they received in their gross income for the year 1980 and paid taxes thereon. All twenty-one Petitioners filed IRS claims for refund and were summarily denied.

REASONS FOR GRANTING THE PETITION

There are two reasons why this Petition for Writ of Certiorari should be granted. There is an apparent conflict, pursuant to Rule 17.1(a), between the decision in the instant case and Stevens v. Commissioner, 452 F.2d 741 (Ninth Cir. 1971). In Stevens the court cited with approval Cohen: Handbook of Federal Indian Law, at 265, where "Felix S. Cohen, an acknowledged expert in Indian law" said "that 'it is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom.'"

The second reason this Court should grant the Petition is that since the U.S. Supreme Court decision in Squire v. Capoeman, 51 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956), neither Congress nor the U. S. Supreme Court has had occasion to address the issues that have arisen in

this case with respect to the application of the doctrine of tax exemption. The language cited with approval by the Stevens court was also cited in Capoeman, supra, 351 U.S. at 8, 76 S.Ct. at 616.

This is a case of first impression. The core issue is whether a tribe is subject to income tax on income it derives from the rental of tribal trust land.

Petitioners contend that when the Indian Reorganizations Act, 25 U.S.C. Section 465, is construed in pari materia with 25 U.S.C. Section 335 it creates a tax exemption for tribal income directly derived from tribal trust land in the same manner that the General Allotment Act, 25 U.S.C. Section 348, does for an Indian allottee.

The General Allotment Act of 1887, 25 U.S.C. Section 348, provided for tribal lands to be allotted to individual

Indians in trust for a period of years, after which the lands were to be conveyed to the allottees in fee, "free of all charge or encumbrance whatsoever." 25 U.S.C. Section 348. This provision has been interpreted to prevent taxation of income or capital gains, "derived directly" from allotted land while it remains in trust. Squire v. Capoeman, supra.

Capoeman, happened to be a case which involved an allotment, but the court quoted with approval from Felix S. Cohen's Handbook of Federal Indian Law.

> "It is clear that the exemption accorded **tribal** and restricted Indian lands extends to the income derived directly therefrom." 351 U.S. at 8, 76 S.Ct. at 616.

This quote is also cited with approval in Stevens v. Commissioner, supra, in footnote seven (7), page 744.

The court quoted with approval the opinion of Attorney General Stone:

> "(U)nable, by implication, to impute to Congress under the broad langugage of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property the management and control of which rests largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian." 34 Op.Atty.Gen. 439, 445 (1925) as quoted in Capoeman, 351 U.S. at 8, 76 S.Ct. at 616. Stevens, supra, at 744.

In Capoeman the court held that the tax exemption was created by the General Allotment Act which provides that at the expiration of the trust period the United States will convey the land by patent "in fee, discharged of said trust and free of all charge or encumbrance whatsoever."

The court held in Stevens that "Capoeman is not a technical or narrow

decision; nor is its holding limited to capital gains taxes." Stevens, supra, at 744.

The Court extended the Capoeman holding to lands purchased pursuant to the IRA 25 USC Section 465 because:

> "The provisions of the General Allotment Act were extended to lands purchased for the benefit of Indians by 25 USC Section 335. That Act reads:
>
> 'That unless otherwise specifically provided, the provisions of the Act of February 8, 1887...are hereby, extended to all lands heretofore purchased or which may hereafter be purchased by authority of Congress for the use or benefit of any individual Indian or band **or tribe of Indians.**'" Stevens, supra, at 745. (Emphasis added)

This language makes it clear that the provisions of the General Allotment Act extend to lands purchased for Indian tribes as well as individual Indians. Since the lands in question in this case were purchased by authority of Congress

for the Las Vegas Paiute Tribe, the provisions of 25 USC Section 335 apply in the same manner as in Stevens.

The Court in Stevens went on to hold:

> "Section 5 of the Indian Reorganization Act of 1934, 48 Stat. 985, 25 USC Section 465, authorized the Secretary of the Interior 'in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands * * including trust or otherwise restricted allotments.' It further provided that title 'shall be taken in the name of the United States in trust for the **Indian tribe** or individual Indian for which the land is acquired, and such lands * * * shall be exempt from State and local taxation.'
>
> With respect to the lands purchased for the taxpayer, it is the position of the Interior Department 'that the Act of February 14, 1923, extending provisions of the General Allotment Act to "lands purchased by authority of Congress," clearly extended to these purchased lands the principal provision of trust expressed in the General Allotment Act, **that is, the promise to transfer the land at the end of the period free of**

> all charge or encumbrance whatsoever * * *;' and this, 'coupled with the authority under the Indian Reorganization Act of 1934 for the Secretary to purchase land for Indians, clearly expresses an intent by Congress to exempt these lands from income taxation.'" (Emphasis added) Stevens, supra, at 746.

In the present case the Las Vegas Paiute Tribe is in exactly the same position as Stevens was with respect to the United States of America. The United States purchased lands for the Las Vegas Paiute Tribe; those lands were held in trust, and pursuant to 25 USC Section 335 the United States promised to transfer the land at the end of the trust period free of all charge or encumbrance whatsoever.

However, the Ninth Circuit in this case stated that:

> "The Stevens opinion does not help Anderson. Our decision turned on a finding that, even though Stevens' allotments were not specifically exempted, Congress intended to exempt from taxation **all** allotments and directly derived income.

> Congress had made clear, by two legislataive acts, that all future allotments would be subject to the terms of the General Allotment Act and would carry the same rights and privileges. Id., at 744-45. In light of the 'long-standing Congressional policy of treating Indians equally, except where differences in tribal circumstances justify special legislation,' we concluded that those statutes indicated that Congress intended the terms of the General Allotment Act to apply to all allotments. Id, at 745.
>
> In addition, we gave great weight to the Department of the Interior's position that Congress clearly intended to extend the General Allotment Act to all allotments and that allotments granted under the Act did not differ from those acquired under the Indian Reorganization Act. After considering the statutes and their application by the Department of the Interior, we concluded that Congress intended that all allotments were exempt from taxation under Capoeman. (Slip op. at 4812.)

The attempt to distinguish the Stevens case with respect to allotments is without merit. One of the primary

purposes of the Indian Reorganization Act was to end the allotment policy. In fact, Section 1 of the Reorganization Act, 25 USC Section 461, provided that, "no land of any Indian reservation...shall be allotted in severalty to any Indian." The purpose of the Indian Reorganization Act was to strengthen tribal government and to end the dismal failure of the Allotment Act.

In fact 25 USC Section 462 extended the trust period for allotments indefinitely which made tribal lands and allotments identical with respect to the trust provisions.

The rationale and the laws cited in the Stevens case apply to lands purchased for tribes as well as individual Indians. When 25 USC Section 335 and 25 USC Section 465 are construed in pari materia, it is obvious that the lands acquired for Indian tribes pursuant to 25 USC Section 465 are

to be transferred at the end of the trust period free of all charge or encumbrance whatsoever.

The Ninth Circuit in this case cited United States v. Anderson, 625 F.2d 910 (9th Cir. 1980), cert. denied, 450 U.S. 920 (1981) for the proposition that the income was taxable.

The Anderson case is clearly distinguishable. Anderson was a lessee of tribal property and therefore stood in the shoes of Stephen King in the instant case, not the shoes of the Las Vegas Paiute Tribe.

In fact the court held that Anderson could not invoke the Indian Reorganization Act. The Court stated:

> "IRA Section 16, 25 USC 476, provides that any tribe (which voted to come under the IRA) may adopt a constitution, which 'shall also vest in such tribe or its tribal council' the right and power 'to prevent the sale, disposition, lease, or encumbrance of tribal lands,

interests in lands, or other tribal assets without the consent of the tribe' (emphasis added). It is asserted that because the Tribes have not consented to federal taxation of the licensee of their trust lands, such taxation is an illegal 'encumbrance.'

Even if this argument were valid, it would not benefit Anderson, for IRA Section 16 does not apply to the Fort Peck Tribes. Congress explicitly commanded in IRA Section 18, 48 Stat. 988 [25 USC Section 478], that:

> This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year [later extended to two years] after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

The Fort Peck Tribes voted against the Act. Many years later, they recanted; they

> adopted a tribal constitution in 1960, and have since behaved and been treated by Interior exactly as if they were IRA tribes. Nonetheless, the explicit language of Section 18 does not disappear from our view simply because Interior chooses to wink. If the Tribes wish to be relieved from the effects of their negative vote, they must seek such relief from Congress." Anderson, supra at p. 916.

However, in the present case the Las Vegas Paiute Tribe is a federally recognized tribe organized under the IRA.

There has never been a case in which a court has determined whether the profits derived by an Indian tribe from tribal lands are tax exempt. In fact the only reported cases deal with the issue of whether a lessee of tribal lands is liable for taxes on income derived from those lands.

In Holt v. Commissioner 364 F.2d 38 (8th Cir. 1966) the court held:

> "The land here involved which produced the income in

> controversy is tribal land. Tribal land is held in trust by the United States for the use of the tribe. No individual Indian has title or enforceable right in tribal property...
>
> Any income derived from tribal land accrues for the benefit of the tribe as a whole.
>
> **The issue of whether profits derived by the tribe from tribal lands are exempt from income taxation is not here involved....**
>
> The taxation of the taxpayer's individual profit derived from his lease of tribal land cannot possibly represent a burden or encumbrance upon the tribe's interest in such land." (Emphasis added) 364 F.2d at 41.

On the other hand in the instant case if the tribe's rental income is subject to income taxation it would clearly constitute an encumbrance upon the land, because the land would be subject to a tax lien.

In cases in which Congress has seen fit to terminate the trust with respect to tribal lands it has expressly exempted

from taxation the distribution of the proceeds to the tribal members. Two examples are 25 USC Section 564(j) and 25 USC Section 898 which specifically exempted from taxation the distribution of the assets of the Klamath and Menominee Tribes to their respective members upon termination of the tribes. These exemptions are consistent with Congress' position as expressed in 25 USC Section 335 and 25 USC Section 476, which provide that lands acquired and held in trust for an Indian tribe by the Secretary of Interior be free of any charge or encumbrance whatsoever.

It is critical that this Court determine whether income derived from tribal trust lands is taxable to the tribe. If the income is not taxable to the tribe, then the passthrough by distribution of tax-exempt income from the trust to the beneficiaries does not change

the character of the income and make it taxable. IRC Section 652(b) Since the the beneficiaries of this trust are the members of the tribe, then each member's share from a distribution would not be taxable upon that distribution.

This is analogous to a situation in which the tribe sold its lands and invested the proceeds in tax-exempt bonds and the interest on those bonds were distributed to the beneficiaries of the trust, that income would not be taxable. The tax-exempt character of the proceeds does not change upon its distribution to the beneficiaries of the trust. IRC Section 652(b).

The Internal Revenue Service in Revenue Ruling 67-284 states that "Tribal income **not otherwise exempt** from Federal income tax is includable in the gross income of the Indian tribal member when distributed or constructively received by

him." If the tribal income from the lease of the trust land is tax exempt, the beneficiaries' distribution is not includable in their taxable gross income.

The Ninth Circuit in this case failed to adequately address this issue in its opinion. The court stated:

> "Anderson argues also that because the rents received by the tribe are not taxed they should not be taxed when distributed to tribal members. We have rejected this argument before. Fry, 557 F.2d at 648; Commissioner v. Walker, 326 F.2d 261, 264 (9th Cir. 1964)." (Slip Op. at 4813)

Neither of these cases are on point. In Commissioner v. Walker, 326 F.2d 261 (9th Cir. 1964), respondent was a noncompetent Indian and member of the Gila-Maricopa Indian Community. Its reservation land was divided into two types of land: 1) land allotted to individual Indians for the use and benefit of the allottee and 2) common tribal land

used for the benefit of the entire community. Revenue derived from common tribal land was held in trust by the government for the use and benefit of the entire community. In 1936 the community was chartered as a tribe but the government continued to be trustee of all revenues from common tribal lands, except for an amount permitted by the Secretary of Interior for miscellaneous uses. The Charter prohibited the making of per capita distributions from the trust fund but authorized the payment of salaries to tribal officials. Walker received $4,200 in connection with his services as elected Treasurer. Against his contention that it was income "directly derived from tribal lands" (from sale of crops and leases to non-Indian farmers) which was upheld by the Tax Court, the 9th Circuit in reversing the finding of nontaxability

said:

> "If under the law, the income of an organization is exempt from taxation, it does not follow that the income received by an employee as compensation for service rendered to such organization is also exempt from taxation. Walker, 326 F.2d at 264.

The instant case is critically different from Walker in that the distributions received by Petitioners from the tribe did not constitute compensation for their services but were in fact their pro rata shares from the rental income accumulated under the King lease. Also, the charter of the Las Vegas Paiute Tribe does not prohibit per capita distributions of tribal income.

In Fry v. U.S., 557 F.2d 646 (9th Cir. 1977) also cited by the Ninth Circuit, Fry and his wife were members of the Confederated Tribes of the Coleville Reservation. Fry was employed as a subcontractor by a non-Indian logging

company who had a contract with the tribe and claimed exemption on his income derived from his logging operation. He argued that the income, which the tribe itself directly derives from the logging operations on tax exempt land, is exempt from federal taxation, and therefore his income should likewise be tax exempt. The court found the argument without merit, saying that:

> "Second, even if we assume that the Reservation lands concerned are tax exempt, appellants cannot show that their income derives "directly" from those lands. Fry, supra at 648.

The decision in Fry was grounded mainly on the "directly derived" test and not on the fact that Fry's logging operations were conducted on unallotted reservation lands. Even so, in the case at bar Petitioners' income is that of a lessor, they being the beneficial owners of the unallotted land leased by the Las Vegas Tribe to King, the smokeshop

operator; whereas Fry's income was that of a lessee, a subcontractor who operated on unallotted tribal lands.

There was no claim that Fry was in fact an equitable owner of the reservation land on which he logged. Neither was the court concerned with Fry's distributive share of the tribal income. Fry stood in the shoes of Steven King, the lessee in this case. His income was derived from his labor on tribal land and his income was taxable.

There is no case which holds that a tribal member is subject to federal income tax on his share of a distribution from the tribe of tax its exempt income. If there were such a case it would be in direct violation of Section 652(b) of the Internal Revenue Code.

CONCLUSION

For the reasons stated above it is critical for this Court to decide whether

or not a tribe is subject to income tax on income it derives from the rental of tribal trust land.

Since this core issue has never been addressed by the U. S. Supreme Court the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BELINDA ANDERSON,
Plaintiff,

and

KENNETH ANDERSON; GENEVA ANDERSON; KENNY ANDERSON; ASA BEGAYE; LEWANA BEGAYE; ILEE H. CASTILLO; ALFREDA CATHA; ROBERT FARIA; DEBRA FARIA; BILLY FRYE; MARGARET HENRY; DAISY MIKE; MAX PATRICK; LARRY PETE; DELORES PETE; ANGELA SANCHEZ; DONALD SHEARER; GLORIA SHEARER; ELAINE WILSON; MARIE WILSON; GLORIA YAZZIE,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 87-2120
D.C. No. CV-86-590-LDG
OPINION

Appeal from the United States District Court
for the District of Nevada
District Judge Lloyd D. George, Presiding

Argued and Submitted
February 12, 1988—San Francisco, California

Filed April 25, 1988

Before: Eugene A. Wright, Herbert Y. C. Choy and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Wright

SUMMARY

Taxation/Indians

Appeal from judgment. The court affirmed holding that an Indian tribe's distributions of accumulated rents from unallotted tribal trust land is taxable income to tribal members who receive the payments.

Appellant Anderson and others are members of the Paiute Tribe on a reservation. Part of the reservation land is held in trust by the federal government for the benefit of the tribe. This trust land is not and never will be allotted. The tribe leases a portion of this unallotted trust land to King, a non-Indian, who operates a smoke shop. The tribe distributed accumulated rents from the smoke shop lease to the appellants. They filed amended tax returns claiming that the distributions were exempt. The commissioner denied their claims and appellants sued for a refund.

[1] *Capoeman* states that Indians are citizens and that in the ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. To be valid, exemptions to tax laws should be clearly expressed but doubtful expressions are to be resolved in favor to the tribes and their members. [2] Anderson relies on *Stevens* for his claim that the *Capoeman* exemption applies to income directly derived from tribal trust land. [3] He has not shown that Congress intended to exempt the distributions. Nor has he shown that his interest in the distributions is analogous to a right to receive property free of encumbrance recognized in *Capoeman* and *Stevens*.

COUNSEL

Peter J. Sferrazzi, Reno, Nevada, for the plaintiff-appellant.

Michael J. Roach, Department of Justice, Washington, D.C. for the defendant-appellee.

OPINION

WRIGHT, Circuit Judge:

This appeal presents a question of first impression: Are an Indian tribe's distributions of accumulated rents from unallotted tribal trust land taxable income to tribal members who receive the payments? The district court concluded that because the distributions are not exempt specifically by statute or treaty and taxing them does not implicate an encumbrance on any property interest, they are taxable income. We affirm.

BACKGROUND

Anderson and the other appellants are members of the Paiute Tribe, a federally recognized tribe on a reservation in Las Vegas. Part of the reservation land is held in trust by the federal government for the benefit of the tribe. This trust land is not and never will be allotted. The tribe leases a portion of this unallotted trust land to King, a non-Indian, who operates a smoke shop.

In 1980, the tribe distributed accumulated rents from the smoke shop lease to the appellants. They reported the $34,482 distributions as income for 1980 and filed amended returns claiming that the distributions were exempt. After the Commissioner denied their claims, they sued in federal court for a refund.

The district court ruled for the government on the pleadings under Fed. R. Civ. P. 12(c). It concluded that, because the distributions were not exempt from taxation by treaty or statute, the Commissioner properly denied the refund. Anderson and the others appeal.

ANALYSIS

Appellant challenges only the court's conclusion of law. Although he concedes that *Squire v. Capoeman*, 351 U.S. 1 (1955) does not control our decision, he contends that its reasoning should apply by analogy to exempt the distributions.

[1] In *Capoeman*, the Supreme Court considered whether an Indian's income from the government's sale of timber on his allotted trust land was subject to capital gains tax. The court noted first that "Indians are citizens and that in the ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens." *Capoeman*, 351 U.S. at 6. It continued, "to be valid, exemptions to tax laws should be clearly expressed . . . [but] '[d]oubtful expressions are to be resolved in favor of the [tribes and their members." *Id.* at 6-7. (Citations omitted).

The Court found an expressed exemption for allotted lands and "income derived directly therefrom" in sections 348 and 349 of the General Allotment Act, 25 U.S.C. § 331 *et seq. Id.* at 6-9. Section 348 provides that at the end of the trust period the United States will convey the allotment to the Indian owner "free of all charge or incumbrance whatsoever." Section 349 provides that the Secretary of the Interior may issue a patent in fee simple to an allottee and that "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." The Court construed these sections to mean that "until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted." *Id.* at 8.

The Court reasoned that to serve the purposes of the General Allotment Act, "it is necessary to preserve the trust and income derived directly therefrom." *Id.* at 9. The purpose of the Act was to educate Indians about private property and foster "independence" during the trust period. *See Choteau v. Burnet*, 283 U.S. 691, 694 (1931). At the end of the trust period, restrictions on the land would be lifted and Indian allottees would be able to compete on equal terms in society and the economy. *Id.* The Court concluded that taxing allotments and directly derived income would hinder the Indians' progress toward material independence and disadvantage them in competing with others. *Capoeman*, 351 U.S. at 10.

Courts have applied the *Capoeman* exemption to protect the Indians' statutory rights to take certain property interests free of encumbrance. *See, e.g., Stevens v. Commissioner*, 452 F.2d 741 (9th Cir. 1971) and *Big Eagle v. United States*, 300 F.2d 765 (Ct. Cl. 1962). When that right is not implicated, *Capoeman* does not apply. *United States v. Anderson*, 625 F.2d 910, 914 (9th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981):

> *Capoeman*'s point was that if an Indian's allotted land (or the income directly derived from it) was taxed, and the tax was not paid, the resulting tax lien on the land would make it impossible to receive the land free of 'incumbrance' at the end of the trust period. The purpose of §§ [348 and 349] was 'to provide the allottee with unencumbered land when he became competent. It was not to benefit him simply because he was an Indian or to benefit Indians generally.'

(Citations omitted).

[2] Anderson relies on our decision in *Stevens v. Commissioner*, 452 F.2d 741 (9th Cir. 1971) for his claim that the *Capoeman* exemption applies to income directly derived

from tribal trust land. In that case, Stevens owned several allotments, one he received from the government, one he received from his mother, and others the Secretary of the Interior purchased for him with Stevens' funds. Except for his original allotment, Stevens' allotments were not expressly subject to the "free of incumbrance" language.

Stevens farmed and ranched his own allotments and land leased from the tribe and relatives. We held that the *Capoeman* exemption applied to all of Stevens' allotments and that income derived directly from them was not taxable.

The *Stevens* opinion does not help Anderson. Our decision turned on a finding that, even though Stevens' allotments were not specifically exempted, Congress intended to exempt from taxation *all* allotments and directly derived income.

Congress had made clear, by two legislative acts, that all future allotments would be subject to the terms of the General Allotment Act and would carry the same rights and privileges. *Id.* at 744-45. In light of the "long-standing Congressional policy of treating Indians equally, except where differences in tribal circumstances justify special legislation," we concluded that those statutes indicated that Congress intended the terms of the General Allotment Act to apply to all allotments. *Id.* at 745.

In addition, we gave great weight to the Department of the Interior's position that Congress clearly intended to extend the General Allotment Act to all allotments and that allotments granted under the Act did not differ from those acquired under the Indian Reorganization Act. After considering the statutes and their application by the Department of the Interior, we concluded that Congress intended that all allotments were exempt from taxation under *Capoeman*.

[3] Anderson has not shown that Congress intended to exempt the distributions. Nor has he shown that his interest

in the distributions is analogous to a right to receive property free of encumbrance recognized in *Capoeman* and *Stevens*. He argues only that the tax is "illogical" and undermines the federal policy of fostering economic independence. That may be true. But these arguments should be made to Congress. Until Congress establishes that this income is exempt, we must hold that it is subject to taxation. *See Anderson*, 625 F.2d at 913; and *Fry*, 557 F.2d 646, 649 (9th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

Anderson argues also that because the rents received by the tribe are not taxed, they should not be taxed when distributed to tribal members. We have rejected this argument before. *Fry*, 557 F.2d at 648; *Commissioner v. Walker*, 326 F.2d 261, 264 (9th Cir. 1964).

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATED DISTRICT COURT
DISTRICT OF NEVADA

BELINDA ANDERSON, et al.,

Plaintiffs,

v. CV-86-590-LDG

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS

Plaintiffs, thirty-three (33) members of the Las Vegas Paiute Indian Tribe, brought this action seeking refunds of federal income taxes which they allege were overpaid for the tax year 1980. Defendant moved to dismiss the claims of twelve (12) Plaintiffs for want of jurisdiction, and for judgment on the pleadings with respect to the remaining claims.

The undisputed facts are as follows:

The Paiute Tribe has a reservation which consists, at least in part, of federal lands held in trust for the benefit of the tribe pursuant to the Indian Reorganization Act, 25 U.S.C. Sections 461-479. The tribe leased a portion of unallotted trust land, unimproved, to Stephen King, a non-Indian, who uses the land to operate a smokeshop. The lease provides that Mr. King pay the tribe $1,000 per year, plus ten (10) cents for each carton or box of tobacco products sold each month.

The tribe accumulated its income from the lease and on June 23, 1980, by resolution, distributed a sum of $34,482.75 to each of certain members of the tribe, Plaintiffs herein. Except for Plaintiff THEODORE PETE, all Plaintiffs included these payments in their gross income for the year 1980 and paid the taxes thereon.

Plaintiffs admit that ten (10) of the Plaintiffs have petitions pending with the tax court, and therefore this court lacks jurisdiction to hear their claims. See 26 U.S.C. Sections 6512, 7422(e); Flora v. United States, 362 U.S. 145, 166 (1960); United States v. Wolf, 238 F.2d 447, 449 (9th Cir. 1956). Those Plaintiffs are: BELINDA ANDERSON, VINCENT ANDERSON, MELBA ANDERSON, LILA CARTER, GLADYS LOPEZ, CARMEN PATRICK, HARRY SACKETT, MARY SACKETT, MICHAEL VASQUEZ, and BARBARA VASQUEZ.

Further, Plaintiffs admit that neither HARVEY SEGUNDO nor THEODORE PETE filed a claim for a refund or tax credit which is a jurisdictional prerequisite to any suit for a refund of federal taxes. 26 U.S.C. Section 7422(a); United States v. Freedman, 444 F.2d 1387 (9th Cir. 1971); Thompson v. United States, 308 F.2d 628, 634 (9th Cir. 1962). In addition, and as noted above, Plaintiff THEODORE

PETE did not allege that he paid the taxes in issue.

Accordingly, the claims of the twelve (12) above-names Plaintiffs must be dismissed. The following discussion pertains to the claims of the remaining twenty-one (21) Plaintiffs and whether the government is entitled to judgment on the pleadings.

It is well settled that "Indians are subject to payment of federal income taxes, as are other citizens, unless an exemption from taxation can be found in the language of a Treaty or Act of Congress." Commissioner v. Walker, 326 F.2d 261, 263 (9th Cir. 1964); accord United States v. Anderson, 625 F.2d 910, 913 (9th Cir. 1980). The court is not free to create, by implication, a tax exemption for Plaintiffs. Fry v. United States, 557 F.2d 646, 649 (9th Cir. 1977), cert. denied, 434 U.S. 101 (1978).

Plaintiffs have not referred the court to any treaty or statute that would, by its terms, exempt the amounts in question from federal taxation. Nevertheless, by analogy to Squire v. Capoeman, 351 U.S. 1 (1956), and Stevens v. Commissioner, 452 F.2d 741 (9th Cir. 1971), Plaintiffs contend that the tribe's lease income is exempt from taxation, and therefore, the income distributed to its members should also be exempt.

The court agrees with Plaintiffs that neither the "smokeshop cases" nor any other cases cited by the parties are directly on point with the issue raised in this case. However, even if the court were to accept Plaintiffs' argument that the lease income was "directly derived" from the land, the court still finds no authority to declare an exemption on these facts. The very premise of Plaintiffs' argument is that income derived from

tribal lands is exempt from income tax. However, as the Ninth Circuit noted in Fry, this unsupported assumption is one which Indian tax appellants regularly and unfoundedly seem to make. Fry, 557 F.2d at 648 and n.6.

The tax exemptions allowed in Squire and its progeny have always involved allotted lands. In Squire, the Court construed Sections 5 and 6 of the General Allotment Act, 25 U.S.C. Section 348, 349, to create an express tax exemption for "noncompetent"[1] Indians whose income is directly derived from their individual trust allotments. The Court determined that Congress must have intended such income to be tax exempt because that Act provided for the allottees to take title

[1]The term "noncompetent" Indian, as used in cases such as this, refers to one who has been allotted land that is held in trust for him by the United States and who, therefore, may not alienate or encumber that land without the consent of the United States.

to the land in fee after twenty-five (25) years (or longer if extended). The Court reasoned that if the income derived from the allotted land was taxable, and the "noncompetent" allottee did not pay his tax, a lien would be placed on the property and the allottee would not be able to receive his property free of encumbrances at the end of the trust period as provided in the Act. See Anderson, 625 F.2d at 914.

On the other hand, the courts have not found income to be tax-exempt, even when it is directly derived from the land, where taxation could not possibly encumber the land, e.g. where the noncompetent Indian cut timber from common tribal lands. See, e.g., Fry, 557 F.2d at 648; Anderson, 625 F.2d at 913; Jourdain v. Commissioner, 617 F.2d 507, 508 (8th Cir., 1980), cert. denied, 101 S.Ct. 116 (1981) (per curiam); Holt v. Commissioner,

364 F.2d 38 (8th Cir. , 1966). Such is the present case.

Plaintiffs' reliance upon Stevens v. Commissioner is misplaced. While it is true that the court in Stevens stated that lands purchased under the Indian Reorganization Act are subject to the same implied exemption from income tax as lands purchased under the General Allotment Act, the court gave "great weight" to the assertion of the Department of the Interior that the established practice of the Department was to allot lands held in trust under the Indian Reorganization Act the same as lands held in trust under the General Allotment Act. The court therefore reasoned that since the allotted lands held in trust under either Act could become encumbered if the income was taxable, the exemption should apply under either Act. Stevens, 452 F.2d 741, 746-49 (9th Cir. 1971).

In this case, however, the Plaintiffs concede that their tribal lands have not been allotted and never will be. Therefore, the exemption in Stevens, is not controlling here. See also Jourdain, 617 F.2d at 508 (income derived from lands held in trust under the General Allotment Act is taxable where the land has not yet been allotted to a particular Indian; it is not enough that the land is reserved for allotment).

Big Eagle v. United States, 300 F.2d 765 (Ct.Cl. 1962)(per curiam), is no more helpful to Plaintiffs' position. There, the taxpayers pointed to a particular statute which the court construed to be analogous to the fee provision in Sections 5 and 6 of the General Allotment Act. After noting the parallel congressional purpose, the court determined that taxation of the mineral royalties derived from the tribal lands might prevent the

"noncompetent" Indians from ever becoming "competent." Big Eagle, 300 F.2d at 765-66. Furthermore, each member of the tribe in Big Eagle had been allotted a particular "share" of the "tribal land" and a particular "headright" to the minerals thereof. Such a position was not advanced in this case, and the court is unaware of any statute here that is comparable to that in Big Eagle.

While the court sympathizes with the position of the Indian Plaintiffs, it is clear that the tax exemptions were not intended to benefit Indians simply because of their Indian heritage, not because the income was derived from land located on Indian reservations. Fry, 557 F.2d at 649; accord Tonasket v. Commissioner, 50 T.C.M. 489 (Wash. 1985); Wynecoop v. Commissioner 76 T.C. 101 (1981). Accordingly,

IT IS HEREBY ORDERED that Defendant's

motion to dismiss and for judgment on the pleadings be granted.

The claims of Plaintiffs BELINDA ANDERSON, VINCENT ANDERSON, MELBA ANDERSON, LILA CARTER, GLADYS LOPEZ, CARMEN PATRICK, HENRY SACKETT, MARY SACKETT, MICHAEL VASQUEZ, BARABARA VASQUEZ, HARVEY SECUNDO, and THEODORE PETE are hereby dismissed.

Judgment is hereby entered for the Defendant and against the remaining Plaintiffs, KENNETH ANDERSON, GENEVA ANDERSON, KENNY ANDERSON, SA BEGAY, LEWANA BEGAYE, ILEE H. CASTILLO, ALFREDA CATHA, ROBERT FARIA, DEBRA FARIA, BILLY FRYE, MARGARET HENRY, DAISY MIKE, MAX PATRICK, LARRY PETE, DELORES PETE, ANGELA SANCHEZ, DONALD SHEARER, GLORIA SHEARER, ELAINE WILSON, MARIE WILSON, and GLORIA YAZZIE.

Dated: March 31, 1987.

LLOYD D. GEORGE
U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BELINDA ANDERSON, et al.,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellees.

No. 87-2120

DC: Nevada
CV-86-590-LDG

O R D E R

_____/

Before: WRIGHT, CHOY and NOONAN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. The Petition for rehearing is denied.

Filed: June 14, 1988

APPENDIX D

25 UNITED STATES CODE

Section 335. Extension of provisions as to allotments

Unless otherwise specifically provided, the provisions of the Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended, are extended to all lands heretofore purchased or which may be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians.

Section 348. Patents to be held in trust; descent and partition

Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five

years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: **Provided,** That the President of the United States may in any case in his discretion extend the period. ...

Section 415(a). Leases of restricted lands for public, religious, educational, recreational, residential, business, and other purposes; approval by Secretary.

(a) Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the

approval of the Secretary of the Interior... All leases so granted shall be for a term not to exceed twenty-five years,... Leases for ... business purposes with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. ...

Section 461. Allotment of land on Indian reservations.

On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

Section 462. Existing period of trust and restrictions on alienation extended.

The existing periods of trust placed upon any Indian lands and any restriction or alienation thereof are hereby extended and continued until otherwise directed by Congress.

Section 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption.

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the alottee be living or deceased, for the purpose of providing land for Indians. ...

Title to any lands or rights acquired pursuant to section 461, 462, 463, 464,

465, 466 to 470, 471 to 473, 474, 475 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Section 476. Organization of Indian tribes; constitution and bylaws; special election.

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, ...

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: ... to prevent the sale,

disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; ...

Section 564j. Taxes, initial exemption; taxes following distribution; valuation for capital gains or losses.

No property distributed under the provisions of this subchapter shall at the time of distribution be subject to Federal or State income tax. ...

Section 898. Taxes; initial exemption; taxes following distribution; valuation for income tax on gains or losses.

No distribution, conveyance, or transfer of title to assets and no issuance or distribution of securities pursuant to the plan approved by the Secretary under the provisions of sections 891-902 of this title shall be subject to any Federal or State transfer, issuance, or income tax...

APPENDIX E

INTERNAL REVENUE CODE

Income Taxes

Section 652. Inclusion of amounts in gross income of beneficiaries of trust distributing current income only.

(a) Inclusion.---Subject to subsection (b), the amount of income for the taxable year required to be distributed currently by a trust described in section 651 shall be included in the gross income of the beneficiaries to whom the income is required to be distributed, whether distributed or not. ...

(b) Character of amounts.---The amounts specified in subsection (a) shall have the same character in the hands of the beneficiary as in the hands of the trust. ...